



# STATE OF CONNECTICUT

## OFFICE OF STATE ETHICS

### Draft Advisory Opinion No. 2013-2

April 12, 2013

**Question Presented:**      **The petitioners ask whether “a government attorney, in particular a legislative caucus attorney, [may] represent a public official, including a state legislator, in such official’s capacity as a ‘[public] agency’ under the Freedom of Information Act where such official is a respondent in a matter before the Freedom of Information Commission.”**

**Brief Answer:**              **Yes. Because a state legislator who is a respondent in a proceeding before the Freedom of Information Commission is there in his or her official capacity as a “public agency,” he or she may accept State-provided legal representation without violating the Ethics Code.**

At its April 2013 regular meeting, the Citizen’s Ethics Advisory Board (“Board”) granted the petition for an advisory opinion submitted by Joseph P. Quinn, Jr., Chief Legal Counsel, Senate Democrats; Jennifer Macierowski, Chief Legal Counsel, Senate Republican Office; Richard Baltimore, Chief Legal Counsel, Speaker of the House; and Deb Hutton, Chief Legal Counsel, House Republican Office. In accordance with General Statutes § 1-81 (a) (3), the Board now issues this advisory opinion, which interprets the Code of Ethics for Public Officials (Ethics Code),<sup>1</sup> is binding on the Board concerning the persons who requested it and who acted in good-faith reliance thereon, and is based solely on the facts provided by the petitioners.

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<sup>1</sup>Chapter 10, part I, of the General Statutes.

### **Facts**

The pertinent facts provided by the petitioners are set forth below and are considered part of this opinion:

It has been customary for legislative attorneys, as well as other government agency attorneys including the Attorney General's Office, to appear before the Freedom of Information Commission on behalf of public officials and agencies. Such practice has not been challenged. However, in light of Advisory Opinion 2008-4, we feel that an official opinion of the Board confirming the appropriateness of this practice would be helpful to all parties.

In Advisory Opinion 2008-4, the Board found that it would be an inappropriate use of office for a legislator to be represented by legislative counsel in a contested case before the Office of State Ethics (OSE). However, the Board noted that it is appropriate for such counsel to seek advice from OSE staff and advisory opinions from the Board to facilitate compliance with the code. While the opinion had been requested by legislative caucus counsel, the Board's legal determination applies equally to all public officials and attorneys.

[W]e believe that it is appropriate for legislative counsel, as well as other state agency attorneys, to appear before the Freedom of Information Commission . . . .

### **Analysis**

Members of the General Assembly are "public officials," as defined in General Statutes § 1-79 (k), and are therefore subject to the Ethics Code's conflict-of-interests provisions, including General Statutes § 1-84 (c), which provides, in relevant part, as follows: "no public official . . . shall use his public office . . . to obtain financial gain for himself . . . ."

In Advisory Opinion No. 2008-4, we applied § 1-84 (c) to the question of "whether a caucus attorney may represent a legislator before the Office of State Ethics concerning an ethics enforcement action . . . ."<sup>2</sup>

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<sup>2</sup>Connecticut Law Journal, Vol. 70, No. 8, p. 1C (August 19, 2008).

We concluded that it would be an improper use of office under § 1-84 (c) for a legislator to accept such representation, and based our conclusion on an informal staff opinion issued by the former State Ethics Commission, two ethics opinions from other states, and, most importantly, the Ethics Code's statutory scheme.<sup>3</sup> Under that scheme, particularly General Statutes § 1-82 (c), the State must reimburse a respondent's "reasonable legal expenses" *only after* one of three triggering events: (1) a judge trial referee finds no probable cause, (2) the Board finds no violation, or (3) a court overturns the Board's finding of a violation. Absent such an event, a respondent "is not entitled to publicly paid legal representation—which is something a legislator . . . would have [already] received if he or she had used the legal services of a caucus attorney."<sup>4</sup>

Our conclusion there is bolstered by a 1981 opinion authored by the then Connecticut Attorney General involving "whether the State can reimburse [a state employee] for legal expenses he incurred for his defense before the State Ethics Commission."<sup>5</sup> The answer was no, and it was premised on (among other things) the Attorney General's reading of General Statutes § 3-125, which gives "the attorney general . . . supervision over all legal matters in which the state is an interested party. . . ." The State, he noted, was not "an interested party" in the enforcement proceeding, as it "had no interest in disproving the allegations against [the state employee] or in vindicating his actions."<sup>6</sup> The State's interest, he went on, was that the proceedings be conducted "in a fair and correct manner," but "this [interest] did not extend to providing the respondent with a legal defense . . . ." <sup>7</sup> Importantly, he finished by noting that

[a] conclusion to the contrary would require the *unwarranted representation of persons in their individual capacity by the Attorney General before other State agencies in other disciplinary procedures*, e.g., elected officials charged by the State Elections Commission with violations of the election laws . . . .<sup>8</sup>

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<sup>3</sup>Id., 3C-6C.

<sup>4</sup>Id., 4C.

<sup>5</sup>Opinion of the Connecticut Attorney General (September 2, 1981). The opinion was issued before § 1-82 (c) was added to the Ethics Code.

<sup>6</sup>Id.

<sup>7</sup>Id.

<sup>8</sup>(Emphasis added.) Id.

We glean from that opinion, then, that a state legislator who is a respondent in a disciplinary proceeding before the Office of State Ethics or the State Elections Enforcement Commission is there in his or her individual (not official) capacity and is therefore not entitled to State-provided legal representation.<sup>9</sup> The question here, therefore, is whether the same holds true with respect to proceedings before the Freedom of Information Commission (“FOIC”); that is, whether a state legislator who is a respondent in a proceeding before the FOIC is there in his or her individual (not official) capacity. If so, the state legislator would not be entitled to State-provided legal representation and would be in violation of the Ethics Code (i.e., § 1-84 (c)) for having accepted it.

To answer that question, we need only look to the very first definition in the Freedom of Information Act (“Act”), namely, the definition of the term “public agency,” which, in relevant part, is this: “Any executive, administrative or legislative office of the state . . . and any state . . . agency, any department, institution, bureau, board, commission, authority *or official of the state . . .*”<sup>10</sup> In other words, a state official (e.g., a state legislator) is considered a “public agency” for purposes of the Act, which can be violated by a state official *only* to the extent that he or she is acting in his or her capacity as such.<sup>11</sup> And so, in answer to the question at hand, a state legislator who is a respondent in a proceeding before the FOIC is there—not in his or her individual capacity (as is the case in ethics or elections proceedings)—but rather in his or her official capacity as a “public agency.” That being the case, the state legislator may accept State-provided legal representation without violating the Ethics Code.

By order of the Board,

Dated \_\_\_\_\_

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Chairperson

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<sup>9</sup>As noted above, a respondent may be entitled to reimbursement of “reasonable legal expenses” under § 1-82 (c),

<sup>10</sup>(Emphasis added.) General Statutes § 1-200 (1) (A).

<sup>11</sup>See *Montanaro v. Joseph J. Crisco, Jr., State Senator*, Docket No. FIC 1997-205 (January 14, 1998) (concluding that respondent did not violate the Act because he “was not acting in his capacity as a ‘public agency’”); *Harris v. Senator, 18<sup>th</sup> District*, Docket No. 2000-161 (July 12, 2000) (same).